keeping of the dog with knowledge of his dangerous nature, but rather the negligent failure to properly restrain the animal." [15] It may further be added that with Mr. Beven such other eminent writers on the law of torts as Bishop [16] and Cooley [17] support the views of these courts.

MARKETABLE TITLE IN EQUITY AND AT LAW. — If the vendor in a contract for the sale of land cannot furnish marketable title, equity will not decree specific performance. The burden of proof is upon the purchaser; [1] but in order to show title unmarketable, proof that it is in fact defective is not necessary: [2] the establishment of a certain degree of doubt in the mind of the court as to its validity will suffice. The reason for this departure from the ancient procedure whereby the chancellor, like the common law judge, had no discretion in the matter, but was wont to pronounce the title good or bad and decree or refuse specific performance accordingly, is, that as the decree of equity is *in personam*, it in no way binds parties not before the court.[3]

The doubt in the mind of the court may be based upon fact or upon law. It may be that a fact constituting an element in the vendor's chain of title cannot be,[4] or is not, proven; [5] or it may be that the happening of an event which would weaken the title is not improbable.[6] In any case, if there remains in the mind of the court a doubt not remote,[7] but rational, — such doubt as would deter a court of law from instructing the jury to find the facts upon which the vendor's title depends,[8] — the title is not marketable. For the purchaser, if compelled to take it, might have to defend against subsequent attack by parties not before the court; and a title depending for its validity upon a suit either at law or in equity is not marketable.[9] Where the facts are admitted by demurrer and so settled for all purposes of the particular suit, as it is open to a party not before the court to show the facts to be different at a subsequent trial, the title may be unmarketable because doubtful in fact, although the precise question upon which the court hesitates is one of law presented by the demurrer.[10]

Again, the validity of the vendor's title may turn upon the establishment of a general principle of law,[11] or the construction of particular instruments,[12] or statutes,[13] or the constitutionality of a statute,[14] or the merits of a *lis pendens*,[15] — in all of which instances an adjudication involves passing upon

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[15] Hayes *v.* Smith, 62 Oh. St. 161, 182.
[16] Bishop, Non-Contr. Law, 1225, 1230.
[17] 2 Cooley, Torts, 3 ed., 696-697, 706-708.

1 Rosenblum *v.* Eisenberg, 123 N. Y. App. 896, 899.
2 See Spencer *v.* Sandusky, 46 W. Va. 582, 585.
3 See Gill *v.* Wells, 59 Md. 492; Richmond *v.* Gray, 85 Mass. 25.
4 Lowes *v.* Lush, 14 Ves. Jr. 547. See Shriver *v.* Shriver, 86 N. Y. 575, 585.
5 Fleming *v.* Burnham, 100 N. Y. 1, 11.
6 Kilpatrick *v.* Barron, 125 N. Y. 751, 755.
7 Tolosi *v.* Lese, 120 N. Y. App. 53, 59.
8 See Shriver *v.* Shriver, *supra*.
9 See Brokaw *v.* Duffy, 165 N. Y. 391, 399.
10 Abbott *v.* James, 111 N. Y. 673, 677.
11 Taylor *v.* Chamberlain, 39 N. Y. Supp. 737.
12 Cunningham *v.* Blake, 121 Mass. 333; Richards *v.* Knight, 64 N. J. Eq. 196, 204.
13 Daniel *v.* Shaw, 166 Mass. 582.
14 Daniel *v.* Shaw, *supra*.
15 Hayes *v.* Nourse, 114 N. Y. 595, 604. But see Linn *v.* McLean, 80 Ala. 360, 367.

the claim of a party not before the court. Accordingly, if the court is itself divided,[16] or if it believes that there is reasonable ground for considering the question not settled by previous authorities,[17] or if there are dicta of weight indicating that another court of competent jurisdiction might reach a different conclusion,[18] the title cannot be called marketable.

The doctrine of marketable title is essentially an equitable one. In the absence of express stipulation a vendor was under an implied obligation at law to furnish only a "good" title,[19] which originally meant a title not bad in fact though it might be doubtful.[20] But in England the courts of law have adopted the equitable doctrine, certainly where the title is doubtful in fact,[21] and probably where it is doubtful as a matter of law.[22] In this country a tendency in the same direction appears in one or two jurisdictions which have separate systems of law and equity.[23] And in those where the two systems are combined, the equitable doctrine has been expressly carried over into actions at law.[24] The effect of this extension is illustrated by a recent decision in favor of the plaintiff, where the plaintiff sued at law to recover an installment and the defendant asked specific performance. *Dixon* v. *Cozine*, 114 N. Y. Supp. 685. Decisions of this kind are rapidly obliterating the distinction at law between title "good" and title "marketable," even when only the former is expressly contracted for.[25]

INDEMNIFICATION OF BAIL IN CRIMINAL CASES. — The defendant in a criminal case and his bail bear to each other the relation of principal and surety. A surety on a civil bond has, against his principal and co-sureties, the rights to indemnity,[1] contribution,[2] and, doubtless, subrogation,[3] of sureties generally. Early cases make little distinction between civil and criminal sureties; their positions in these respects were probably once identical.[4] Their obligations, however, are distinct: a civil surety undertakes that the principal shall perform his obligation;[5] a criminal surety guarantees the appearance of his principal for prosecution.[6] And on the ground that the chances of the prisoner's escape will be increased if his non-appearance involves no pecuniary loss to his bail, later courts have opposed the

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16 Abbott *v.* James, *supra.*
17 Cornell *v.* Andrews, *supra*, p. 18.
18 Lippincott *v.* Wikoff, 54 N. J. Eq. 107, 120.
19 Souter *v.* Drake, 5 B. & Ad. 992, 1002.
20 Boyman *v.* Gutch, 7 Bing. 379, 392. See Meyer *v.* Madreperla, 68 N. J. L. 258, 268.
21 Simmons *v.* Heseltine, 5 C. B. N. S. 554, 571.
22 Jeakes *v.* White, 6 Exch. 873, 881. *Contra*, Boyman *v.* Gutch, *supra.* See Simmons *v.* Heseltine, *supra.*
23 See Colwell *v.* Hamilton, 10 Watts, 413, 416; Swayne *v.* Lyon, 67 Pa. 436, 442; Harrass *v.* Edwards, 94 Wis. 459, 464; Hollifield *v.* Landrum, 31 Tex. Civ. App. 187. *Contra*, Meyer *v.* Madreperla, *supra.*
24 Moore *v.* Williams, 115 N. Y. 586, 597; Ladd *v.* Weiskopf, 62 Minn. 29.
25 See Herman *v.* Somers, 158 Pa. 424, 428; Reynolds *v.* Borel, 86 Cal. 538.

1 Fisher *v.* Fallows, 5 Esp. 171.
2 Belldon *v.* Tankard, 1 Marsh 6.
3 *Cf.* King *v.* Bennett, Wightw. 1.
4 Comyn, Dig., Bail, Q. 1; Petersdorff, Bail, 423.
5 Stevens *v.* Bigelow, 12 Mass. 433.
6 Cripps *v.* Hartnoll, 4 B. & S. 414.